

**PUBLIC INTEGRITY COMMISSION
MINUTES
December 18, 2018
10:00 A.M.**

1. Call to Order: 10:05. Present—Bonnie Smith (Chair); William F. Tobin, Jr. (Vice-Chair); Commissioners: Andrew Gonser, Esq., Andrew Manus; Commission Counsel, Deborah J. Moreau, Esq.

2. Approval of Minutes for November 20, 2018: Moved—Commissioner Manus; seconded—Commissioner Tobin. Vote 4-0, approved.

3. Administrative Items

A. Candidates that failed to file their Financial Disclosures for 2018 election were referred to the Attorney General's Office.

B. Commissioner Gonser discussed his trip to the COGEL conference in Philadelphia.

4. Motion to go into Executive Sessionⁱ to Hear Requests for Advisory Opinions, Waivers and Referrals: Moved—Commissioner Gonser; seconded—Commissioner Manus. Vote 4-0, approved.

5. 18-43—Appearance of Impropriety

Note: At the November 20, 2018 Commission meeting, the Commission granted [a] request for an investigation into an alleged conflict of interest. This is Commission Counsel's report of information voluntarily provided [by the contacted parties].

I. Procedure

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, ch. 58. 29 Del. C. § 5810(a). In October 2018, PIC received a Complaint via email and received a hard copy via U.S. Mail on October 24, 2018. The Complaint appeared to be notarized in the appropriate format. (29 Del. C. § 4328(3)). (See *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013))).

II. Jurisdiction: The Commission's jurisdiction was limited to interpreting Title 29, Del. C., ch. 58. See, e.g., 29 Del. C. § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

A. Personal Jurisdiction

State employee is defined as a member...of a state agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such service in a calendar year. 29 Del. C. § 5804(12)a. [Employee] was a State employee and fell within the Commission's jurisdiction.

B. Subject Matter Jurisdiction

The Commission could only address alleged violations of "this chapter"-Title 29, ch. 58. 29 *Del. C.* § 5810(h). The Complaint alleged [Employee] created an appearance of impropriety based [non-employment related activities]. [Acquaintance] occasionally [does business with Employee's agency]. The appearance of impropriety statute is 29 *Del. C.* § 5806(a) which is within the Commission's jurisdiction. However, the alleged conduct also included [other activities which were] not within the Commission's jurisdiction.

III. Facts

[Complainant] alleged that [outside activities] by [Acquaintance] and [Employee] created an appearance of impropriety which would cause the public to question whether [Employee] could perform their official job duties independently and impartially. [Complainant] asked the Commission to conduct an investigation into [Employee]'s official activities as they related to [Acquaintance], and/or matters they had pending before the [Agency].

[Employee] was fully cooperative with the investigation and voluntarily provided Commission Counsel with a copy of a memorandum he/she gave to [their supervisor] shortly after his/her employment began. The memorandum listed the names of matters pending before the [Agency that required his/her recusal]. Those matters were designated to be handled by [another employee]. He/she further stated that they had not made any decisions about matters involving [Acquaintance].

In addition, [Employee's supervisor] provided a notarized attestation detailing [Employee]'s involvement, or lack thereof, with matters related to [Acquaintance]. [Employee's supervisor] attested that during [Employee]'s tenure the [Agency] had completed 12 matters. [Acquaintance] was not involved in any of those matters. Of the matters still pending, 14 involved [Acquaintance]. Six of those 14 were included in the recusal memo. The other eight matters were new matters in which [Employee] had no previous involvement and were not included in the recusal memo. Of those 14 new matters, the [Agency] had substantial communication with five of them since [Employee] was hired. Four of those were handled by [another employee]. The remaining matter was a new matter from which [Employee] recused themselves.

Commission Counsel spoke to [Acquaintance] about the allegations because he/she was mentioned in the Complaint. He/she stated that other than a casual 'hello', he/she had not had a conversation with [Employee] for at least two years. He/she did not consider their acquaintance to be friendly enough to cause concern about an appearance of impropriety.

Commission Counsel reviewed the statutes administered by the [Agency]. The statutes themselves are extensive, setting forth procedures in great detail.

IV. Application of the Law

29 *Del. C.* § 5806(a): Each state employee, officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such employee, officer or honorary official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the state and its government.

This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d

825 (Del. 1997). In deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

The Commission has previously held that in deciding if there is an appearance of impropriety it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75* (citing *CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567 (1967)). That holding is consistent with the Delaware Supreme Court decision which held: absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the "appearance of impropriety." It noted that appearances of impropriety claims have been criticized as being too "imprecise, leading to ad hoc results." *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991).

The investigation revealed that: 1) [Employee]'s association with [Acquaintance] did not create a conflict of interest with his/her job duties that had not already been remedied by his/her voluntary recusal from certain matters. As a result, there could not be an associated appearance of impropriety; 2) [Employee] had not reviewed or disposed of official matters related to [Acquaintance] since he/she began working for the Agency.

Motion--Notwithstanding the lack of an adequate factual allegation in the Complaint, the Commission reviewed and investigated the matter to see if there was an appearance of impropriety and determined that the Complaint was without merit and was dismissed. Moved—Commissioner Manus; seconded Commissioner Gonser. Vote 4-0, approved.

6. 18-44—Referral to the Attorney General's Office

Breach of 29 Del. C. § 5810(h) and § 5805(e)

Note: At the November 20, 2018 Commission meeting, a motion was made to refer [Complainant] to the Attorney General's office for breaching the confidentiality restrictions in the Code of Conduct. Commission Counsel drafted a letter but did not send it to [Complainant]. After drafting the letter, Counsel wanted to check the case law on confidentiality statutes before pursuing criminal action.

A review of relevant case law showed that the Code of Conduct's confidentiality provisions may be a violation of the First Amendment's right to free speech. Of particular concern was a 3rd Circuit case, *Stilp v. Contino*. Delaware is part of the 3rd Circuit which meant that Delaware courts would be required to follow the circuit's case law unless the facts of the case could be distinguished from the prior opinion in some way. Counsel provided the Commissioners with other relevant case law that was copied and pasted into a document for the Commission's review. Much of the case law contained fact patterns similar to the situation with [Complainant].

Dilemma--The Commission could not:

Declare their own statute unconstitutional.

Ask the AG's office for an opinion because they did not have jurisdiction over the Commission's statutes.

Ask the court decide the constitutionality of the statute because there was no case before them.

The Lawyer's Rules of Professional Conduct prevented Commission Counsel from sending the matter to the AG's Office in the hopes [Complainant] would contest it, thus putting a case before the court. Counsel had an ethical obligation not to pursue legal matters that did not have a reasonable probability of success.

Motion—The Commission decided to refer the matter to the AG's Office, thus conferring jurisdiction, and to include language in the referral letter that indicated the statute may be unconstitutional.

Moved—Commissioner Tobin; seconded—Commissioner Manus. Vote 4-0, approved.

5. 18-47—Letter Complaint, Appearance of Impropriety

In November 2018, [Complainant] sent a letter to PIC. A hard copy was sent via U.S. Mail and received in the office on November 30, 2018. [Complainant] asked the Commission to open an investigation into [a State official]. [The Complaint referenced conduct unrelated to the Official's State job duties]. According to [Complainant], [Official] was subject to the Code of Conduct applicable to all State officials. As such, he/she believed that [Official's] personal conduct reflected unfavorably on the state and its government, a violation of 29 *Del. C.* § 5806(a), often referred to as the appearance of impropriety standard.

Jurisdiction

The Commission's jurisdiction is limited to interpreting Title 29, *Del. C.*, ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

29 *Del. C.* § 5806(a) reads in full:

Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee, state officer or honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.

[The Commission concluded that they did not have jurisdiction over the Official. Even if jurisdiction existed, there was no legitimate argument that Official's conduct was an exercise of government power]. The same reasoning applied to the invocation of § 5806(a), the appearance of impropriety standard. That provision must be interpreted in the context of the Code of Conduct's purpose. To interpret the standard any other way would allow the provision to apply to behaviors that were not otherwise violations of the Code of Conduct.

Motion—Complaint dismissed for lack of personal and subject matter jurisdiction. Moved—Commissioner Manus; seconded—Commissioner Gonser. Vote 4-0, approved.

6. 18-51—Referral to the Attorney General's Office

In November 2018, [Complainant] emailed a letter to the State Public Integrity Commission (“PIC or Commission”). A hard copy was sent via U.S. Mail and received in the office on November 30th. In the letter [Complainant] asked the Commission to open an investigation into [a State official]. He/she opined that [Official’s personal conduct] reflected unfavorably on the state and its government, a violation of 29 *Del. C.* § 5806(a), often referred to as the appearance of impropriety standard.

Despite the confidentiality requirements related to matters submitted to the Commission, [Complainant]’s letter to the PIC appeared in its entirety in more than one media outlet. In addition, he/she responded to reporter’s questions about the letter and the contents therein.

II. APPLICABLE LAWS

A. 29 *Del. C.* § 5808A—Commission Counsel Power and Duties

(a) There shall be a Commission Counsel who shall be the legal representative of the Commission and have the following powers and duties:

(3) To review information coming to the attention of the Commission relating to Potential violations of this chapter.

(4) To investigate information coming to the attention of the Commission that, if true, would constitute a violation of any provision of this chapter and/or to recommend that possible violations of these, or other state and federal laws, be referred by the Commission to the Attorney General or the United States Attorney for investigation and prosecution. Matters may be so referred to the Attorney General or the United States Attorney only upon a determination by at least a majority of the Commission that there are reasonable grounds to believe that a violation may have occurred.

B. 29 *Del. C.* § 5810(h)(1)—Complaints; Hearings; Dispositions

All proceedings relating to a charged violation of this chapter shall be maintained confidential by the Commission unless:

- a. Public disclosure is requested in writing by the person charged; or
- b. the Commission determines after a hearing that a violation has occurred.

C. 29 *Del. C.* § 5805(e)—Unauthorized disclosure of confidential information

No person shall disclose any information required to be maintained confidential by the Commission under § 5806(d), § 5807(b) or (d), or § 5810(h) of this title. (*Emphasis added*).

III. APPLICATION OF THE FACTS TO THE LAW

Commission Counsel was required by law to report to the Commission a suspected violation of the Code of Conduct. Counsel brought the matter to the Commission for a determination of whether there were reasonable grounds to believe that [Complainant] violated the confidentiality provisions of 29 *Del. C.* § 5810(h) and § 5805(e).

After examining the relevant facts and statutes, the Commission decided that [Complainant] knowingly violated the law by discussing his letter with various media outlets in contravention of State law.

IV. FIRST AMENDMENT CASE LAW

In researching case law applicable to the factual scenario, Commission Counsel found case law¹ which indicated that the confidentiality provisions cited above *may be* a violation of the First Amendment's right to free speech. In the interest of fairness to all parties, the applicable case law was forwarded to the Attorney General's Office with the referral.

Motion--The Commission voted to forward the matter to the Office of the Attorney General, as mandated by their governing statutes, for consideration of prosecution and/or fines. A copy of the letter was provided to [Official] since it was his/her right to confidentiality that was violated. Moved—Commissioner Manus; seconded Commissioner Tobin. Vote 4-0 approved.

7. 18-38—Post Employment

[Employee] worked for [a particular State agency until] August 2018. Her duties were: interviewing clients and family members to gather background information and make referrals for services; assessing the client's progress and providing that information to courts and law enforcement agencies; collaborating with schools, doctors and other service providers to set goals and measure her client's progress.

[Employee] wanted to accept a contract position offered by [her former agency]. Her job duties would include working with school students and their families in the school environment assessing needs, assisting with the development of interventions (within the school), and making referrals for additional services. The demographic of her new clients would be similar to that of her previous State clients.

[Employee] asked the Commission if her contractual position would violate the post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

¹ *Stilp v. Contino*, 613 F.3d 405 and all related case citations.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. Commission Op. No. 96-75 (*citing Medico* at 842). See also *Beebe*.

To ascertain if there was a substantial overlap the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] had worked on the subject matter, assisting youth clients, while employed by the State. However, her State clients were older than those she would be working with in the schools. As a result, it was unlikely she would encounter a former client while working as a contractor. Should such a circumstance occur, she was advised to recuse herself from working with that client. Recusal meant she should report the conflict to her supervisor, so that another [contractor] could be assigned to assist the client. The recusal requirement would be in place until August 2020, two years after she left [her former Agency]. When asked how she heard about the job posting, [Employee] responded that she had seen a posting on the State website. Therefore, her application was part of a fair and equal competitive selection process, lessening the likelihood that her former co-workers had interceded on her behalf.

[Employee] was also reminded of the prohibition against revealing confidential information gained during her employment with the State. 29 Del. C. § 5805(d).

Motion—No conflict as long as [Employee] recused as necessary. Moved—Commissioner Gonser; seconded—Commissioner Tobin. Vote 4-0, approved.

8. 18-49 Michael Vild--Post Employment (*Commission Counsel recusing*) (*Waiver GRANTED*)

Because of Commission Counsel’s recusal, what follows is a short summary of information related to Counsel after meeting with the party and the Commission’s decision.

Mr. Vild asked the Commission for a waiver of the post-employment restriction to allow him to work on litigation as a private attorney that he had started while a state-employed attorney. His former supervisor, Aaron Goldstein, State Solicitor, wrote a letter of support stating that Mr. Vild’s continuing work on the litigation was necessary and that the agency (the Attorney General’s Office) would suffer a hardship if the waiver was denied.

Moved—The Commission decided to grant a waiver of the post-employment restriction based on agency hardship until the expiration of the post-employment restriction or the end of the litigation, whichever came first. Moved—Commissioner Gonser; seconded Commissioner Manus. Vote 4-0, approved.

9. Adjournment

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to

the confidentiality standards in *29 Del. C. § 5805(f)*, *29 Del. C. § 5807(d)* Advisory Opinion Requests, and *29 Del. C. § 5810(h)* for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, *29 Del. C. § 5805(f)*, *29 Del. C. § 5807(d)*, or the person charged in a complaint requests a public meeting. *29 Del. C. § 5810(h)*. No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.